**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**DIVISION OF JUDGES**
**NEW YORK BRANCH OFFICE**

**TROUTBROOK COMPANY, LLC d/b/a**
**BROOKLYN 181 HOSPITALITY, LLC**

**Case No. 29-CA-275229**

**and**

**NEW YORK HOTEL AND MOTEL TRADES**
**COUNCIL, AFL-CIO**

***Brent Childerhose, Esq.***, for the General Counsel.
***Gideon Martin, Esq.***, of New York Hotel and Motel Trades Council, AFL-CIO, New York, New York, for the Charging Party
***Raymond Pascucci, Esq. and Louis DiLorenzo, Esq., (Bond, Schoeneck & King, PLLC)*** of Syracuse, New York, for the Respondent

## DECISION

Statement of the Case

**LAUREN ESPOSITO, Administrative Law Judge.** Based upon a charge filed on April 5, 2021, by New York Hotel and Motel Trades Council, AFL-CIO (HTC or the Union), on June 17, 2021, the Regional Director, Region 29, issued a Complaint and Notice of Hearing against Troutbrook Company, LLC d/b/a Brooklyn 181 Hospitality LLC (Troutbrook or the Hotel). The Complaint alleges that Troutbrook violated Sections 8(a)(1) and (5) of the Act by failing and refusing to bargain collectively and in good faith with HTC by its overall conduct, including: (a) refusing to provide comprehensive counterproposals; (b) restricting the non-economic subjects over which it would bargain; and (c) refusing to bargain regarding economic subjects until all non-economic subjects of bargaining were resolved. Troutbrook filed an Answer on July 1, 2021 denying the Complaint's material allegations.

This case was tried before me by videoconference, on August 3, 2021.[1] On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for the General Counsel (General Counsel), and Troutbrook, I make the following

[1] No party has raised any objection to conducting the hearing by videoconference or to any specific aspect of the videoconference hearing process.

## Findings of Fact

### I. Jurisdiction

Troutbrook, a limited liability company which owns a hotel located at 181 3rd Avenue, Brooklyn, New York admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Troutbrook also admits, and I find, that HTC is a labor organization within the meaning of Section 2(5) of the Act.

### II. Alleged Unfair Labor Practices

#### A. *The Parties, HTC's Certification, and Previous Proceedings*

The instant case involves bargaining for a first contract after protracted litigation involving objections and challenges to HTC's certification by the Board following a representation election. On June 26, 2018, the Board conducted a representation election among Troutbrook's employees in the following bargaining unit:

> Included: All full-time and regular part-time front-desk employees, housemen/bellmen, housekeepers, laundry attendants and food and beverage employees employed by the Employer at 181 3rd Avenue, Brooklyn, New York.
>
> Excluded: Executive management, sales personnel, fire safety directors, all other employees including guards and supervisors, as defined by the National Labor Relations Act.

On August 3, 2018, the Regional Director ordered that a re-run election be conducted based upon Troutbrook's objections.[2] The re-run election was conducted on September 6, 2018, and a majority of the bargaining unit employees voting in that election selected HTC as their exclusive collective bargaining representative. Thus, on September 24, 2018, the Regional Director, Region 22, certified HTC as the exclusive collective bargaining representative of the bargaining unit employees. Troutbrook admits and I find that at all times since September 24, 2018, HTC has been the exclusive collective bargaining representative of the employees in the above bargaining unit pursuant to Section 9(a) of the Act.

After the second election, Troutbrook filed objections which were "nearly identical" to the elections it had filed after the first election, pertaining to HTC's alleged pre-election misconduct. G.C. Ex. 2(a), p. 2. The Regional Director overruled these objections on the grounds that they pertained to events which occurred prior to the first

[2] The Regional Director determined that Troutbrook had posted an inaccurate Notice of Election, and ordered a re-run election based on Troutbrook's objection in that regard. Because the Regional Director ordered a re-run election on this basis, he did not address Troutbrook's multiple objections alleging that HTC engaged in pre-election misconduct. See G.C. Ex. 2(a), p. 2.

election, and therefore took place outside the critical period for the second election. See *Singer Co.*, 161 NLRB 956, 956 fn. 2 (1966) (critical period for a second election begins on the date of the first election and ends on the date of the second election); *Nestle Co.*, 248 NLRB 732, 733 fn. 3 (1980), enf'd. 659 F.2d 252 (D.C. Cir. 1981). Troutbrook requested review of the Regional Director's decision to certify the results of the second election, which the Board denied on December 13, 2018. *Troutbrook Co.*, 367 NLRB No. 56.

Troutbrook then refused to bargain with HTC in order to obtain appellate review of the certification and the Board's dismissal of its objections. In a Decision and Order dated June 3, 2019, the Board granted General Counsel's Motion for Summary Judgment, and issued an order requiring that Troutbrook bargain with HTC. *Troutbrook Co.*, 367 NLRB No.139. In its decision, the Board rejected Troutbrook's contention that HTC's alleged misconduct prior to the first election had a "continuing impact" on the re-run election which led to HTC's certification, stating that Troutbrook had offered no evidence to support this contention and had not filed unfair labor practices relating to HTC's alleged misconduct. *Troutbrook Co.*, 367 NLRB No. 139 at p. 2, fn. 2.

Troutbrook subsequently filed a Petition for Review of the Board's June 3, 2019 order with the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a Cross-Application for Enforcement. The District of Columbia Circuit issued a Judgment on February 28, 2020 denying Troutbrook's Petition for Review and granting the Board's Cross-Application for Enforcement. G.C. Ex. 2(a), p. 1-4; *Troutbrook Company, LLC v. NLRB*, 801 Fed.Appx. 781. On April 22, 2020, the District of Columbia Circuit issued its mandate in connection with the February 28, 2020 Judgment. G.C. Ex. 2(b).

B. *The Parties' Collective Bargaining Negotiations*

After the District of Columbia Circuit issued its mandate, Troutbrook and HTC began negotiations for an initial collective bargaining agreement. The parties have met six times since April 22, 2020 – on May 18, 2020, June 4 and 25, 2020, February 2, 2021, March 11, 2021, and April 21, 2021. G.C. Ex. 2(c, e, h, j, m, p); R.S. Ex. 1. All negotiating sessions have taken place by telephone conference due to the impact of the COVID-19 pandemic. Tr. 17; R.S. Ex. 1. The principal spokespersons for the parties have been Assistant General Counsel Gideon Martin for the Union and Attorney Raymond Pascucci for the Hotel. Martin testified for General Counsel at the hearing, and Pascucci testified on behalf of Troutbrook.

There is little factual dispute regarding the course of collective bargaining in this case. During their testimony, Martin and Pascucci identified their respective parties' notes of the negotiating sessions, which were admitted into evidence without objection, and explained the Union and Troutbrook's negotiating strategies. Tr. 18-20. Martin testified that the Union's notes were not verbatim transcripts, but captured all of the substance of the various negotiating sessions, and Pascucci, who was cross-examining Martin at the time, agreed. Tr. 45-46. Martin and Pascucci both testified that they had

reviewed the notes of the negotiating sessions prepared by the Respondent and the Union, respectively, and that the other party's notes contained nothing inaccurate. Tr. 60, 87. Thus, the following account of the parties' bargaining is based primarily on their notes of the negotiating sessions, in evidence as General Counsel's Exhibits 2(c), (e), (h), (j), (m), and (p), and Respondent's Exhibit 1. I note in that respect that the Union's notes in evidence as subparagraphs of General Counsel Exhibit 2 are significantly more detailed in terms of the discussions during negotiations than are the Hotel's notes in evidence as Respondent's Exhibit 1, and that the Hotel's notes are more summary.

The parties first negotiating session took place on May 18, 2020. Tr. 17-20; G.C. Ex. 2(c); R.S. Ex. 1. General Counsel and Executive Vice President Rich Maroko attended this session for HTC and was the Union's chief spokesperson, with Martin and Assistant Director of Organizing Arisha Sierra-Blas also present. Pascucci attended with Accounting Manager Ben Crespi for the Hotel. Earlier that day, prior to the session, Martin had sent Pascucci the Union's proposal, which consisted of its Industry-Wide Agreement with the Hotel Association of New York City, Inc. (the IWA), together with a Memorandum of Understanding (the Rider) modifying the IWA's terms with respect to Troutbrook. Tr. 22-23, 25, 58; G.C. Exs. 2(d), 3. At the negotiating session, Maroko reviewed the IWA's terms and the Rider, covering both economic subjects such as wages and benefits and non-economic provisions. G.C. Ex. 2(c); R.S. Ex. 1. Pascucci stated that he needed some time to fully review the Union's proposal with Troutbrook, and would contact the Union the following week regarding dates for additional negotiating sessions. Tr. 70-71; G.C. Ex. 2(c); R.S. Ex. 1.

The second negotiating session took place on June 4, 2020. In addition to Maroko and Martin, Operations Assistant Julissa Sanchez attended for HTC. Pascucci and Crespi attended for Troutbrook. G.C. Ex. 2(e); R.S. Ex. 1, p. 1. Maroko began by asking Pascucci whether Troutbrook had reviewed and the IWA and Rider provided by the Union, and whether the Hotel had any response. Pascucci, however, suggested that the parties discuss several ground rules. Specifically, Pascucci proposed that the parties agree to forego recording negotiating sessions, to focus on non-economic issues before moving on to economic issues, to make requests for information in writing and provide responses within a reasonable time frame, and to present formal proposals in writing. Finally, Pascucci proposed that no individual issue would be considered agreed-upon until the parties had signed a tentative agreement. Maroko immediately responded that the Union wanted to discuss the entire contract without limitations, but an agreement to forego recording of sessions and put requests for information in writing would be acceptable. Maroko suggested that Pascucci provide the proposed ground rules in writing for the Union's review. G.C. Ex. 2(e), p. 1; R.S. Ex. 1, p. 1.

Pascucci then presented several "key points" in response to the IWA and Rider provided by the Union. Pascucci stated that Troutbrook was "NOT willing to accept the IWA." R.S. Ex. 1, p. 1 (emphasis in original). Pascucci elaborated that given the differences between the hotel industry in Brooklyn and Manhattan in terms of labor market and room rates, and the impact of the COVID-19 pandemic, Troutbrook intended to negotiate a "stand-alone CBA" appropriate for "a small business with a small

workforce" under "severe financial strain." Id. Thus, Troutbrook wanted a "simple streamlined contract" with "concise and plainly worded" terms in order to "avoid disputes over interpretation." G.C. Ex. 2(e), p. 1; R.S. Ex. 1, p. 1.

Maroko asked whether in describing the IWA and Rider as unacceptable Pascucci was referring to economic or non-economic issues, and Pascucci responded "all of it," characterizing the IWA's language as "way to convoluted and unnecessarily complex and burdensome." G.C. Ex. 2(e), p. 1-2. Maroko responded that over 200 hotels, a number of which were in Brooklyn, were subject to the IWA and able to work with its language and provisions. Maroko stated, "I certainly understand if the hotel says I want to look at the economics both in terms of room rates and labor market, or there are specific work rules you want to discuss." However, Maroko described the wholesale rejection of the IWA as "a knee jerk reaction" characteristic of employers which "don't want to get a deal anyway." G.C. Ex. 2(e), p. 2. Maroko asked Pascucci why the Hotel would object to provisions such as visitation, successors and assigns, scheduling, and bulletin boards. Pascucci responded, "We can go topic-by-topic and I'm sure some things will be easy to agree," but specifically rejected the successors and assigns language. Pascucci stated that the Union had proposed a lengthy contract with detailed provisions "written for the larger industry or hotel chains." Maroko responded that signatories to the IWA included large chains such as Marriott and Hilton, but also small, independently owned hotels in Brooklyn. Maroko stated that the IWA was a "mature document," containing provisions developed over many years to accommodate hotel owners and operators and hotel workers. Maroko asserted that the work being performed by Troutbrook's bargaining unit employees was not appreciably different from the work being performed by bargaining unit employees at other hotels, so that the Troutbrook employees' terms and conditions of employment should not vary substantially from those of other hotel employees represented by the Union. Pascucci said that Maroko seemed to be describing a "one-size-fits-all" approach, and Maroko responded, "Yeah, pretty much." G.C. Ex. 2(e), p. 2; R.S. Ex. 1, p. 1.

At that point, Crespi stated that the Union's approach "Doesn't seem in good faith," and suggested that Pascucci continue with his "good faith" presentation. Maroko stated that Pascucci needn't "pretend" and "put on a show," asking "What is the issue with access and bulletin board?" Maroko suggested that Pascucci's reluctance to address such topics indicated that Troutbrook intended to merely "go through the motions." Pascucci responded that Maroko was making an assumption, and Maroko stated that he was interpreting the company's actions "in plain English." Maroko told Pascucci to make a proposal and the Union would respond. Pascucci said that plain English as opposed to convoluted language was precisely what Troutbrook was seeking. Maroko responded, "So then prove me wrong…If you raise issues that are legitimate, we'll be flexible…We'll wait and see your proposal." Pascucci stated that Troutbrook's proposal "will not be the whole contract, just some of the articles in our contract and we'll state our counterproposal." Maroko responded that "Our position is good faith requires a complete proposal…You should give a full proposal so we can assess the entirety of it." Pascucci countered that "When it's a first contract and you have 50 open issues on the table, it's a lot harder to make progress than 4 issues you

can discuss and then move on." Pascucci stated that he would send the Union some ground rules and the parties could then set a date for another negotiating session. G.C. Ex. 2(e), p. 2-3; R.S. Ex. 1, p. 1.

Several hours after the negotiating session, Pascucci sent Martin an e-mail containing Troutbrook's "proposed groundrules" for the Union's response as follows:

> 1. There shall be no recording of any bargaining sessions whether in-person or via phone.
>
> 2. The parties will focus on non-economic subjects before turning to economic subjects.
>
> 3. Any requests for information will be in writing and the response will be provided within a reasonable timeframe.
>
> 4. All formal proposals and counterproposals will be in writing.
>
> 5. Nothing shall be considered as agreed until the parties have signed a tentative agreement on the subject.

G.C. Ex. 2(g) (p. 32-33);[3] see also R.S. Ex. 1, p. 1. Later that same day, Pascucci e-mailed to Martin "the key points that I made on behalf of the Hotel in today's conference call:"

> The Hotel is NOT willing to accept the IWA.
>
> The hotel industry in Brooklyn is completely different from Manhattan both in terms of the labor market and the room rates.
>
> COVID-19 has decimated the business
>
> The Hotel intends to negotiate a stand-alone CBA that reflects its own operation as a small business with a small workforce and currently under severe financial strain.
>
> The Hotel seeks a simple streamlined contract with terms that re concise and plainly worded so as to avoid any confusion and avoid disputes over interpretation.

G.C. Ex. 2(f) (emphasis in original); see also R.S. Ex. 1, p. 1-2.

[3] General Counsel's Exhibit 2 is paginated sequentially throughout all of its sub-paragraphs. When referring to a subparagraph of General Counsel's Exhibit 2 which is not internally paginated, page numbers in parentheses refer to the sequential page number for Exhibit 2 overall.

Martin provided the Union's response the next day, June 5, 2020. In his e-mail, Martin stated that the Union accepted ground rule #1 prohibiting the recording of negotiating sessions. The Union explicitly rejected ground rule #2, regarding addressing non-economic matters prior to economic issues, stating that "we do not want to constrain the parties' capability to freely explore and discuss any items, such as specific proposals, terms, or conditions, during bargaining sessions." The Union similarly rejected ground rule #5, stating that it was willing to memorialize agreements, but under applicable law a party is not permitted to retreat from an agreement it has made. The Union rejected ground rule #4, requiring that proposals and counterproposals be submitted in writing, although it offered to have the parties put the proposals discussed or a summary in writing to keep everyone updated. With respect to ground rule #3, the Union agreed that responses to requests for information would be provided within a reasonable time frame, but rejected the portion of the rule regarding the presentation of information requests in writing. G.C. Ex. 2(g) (p. 31). Martin stated that he anticipated receiving Troutbrook's counterproposal as well as dates for the next negotiating session. G.C. Ex. 2(g) (p. 30).

On June 10, 2020, Pascucci responded to Martin, providing modified versions of ground rules #2 through #5. With respect to ground rule #2, Pascucci described the proposal as reflecting "a longstanding well-established tradition in labor relations as an orderly framework for achieving progress toward an overall collective bargaining agreement." Pascucci stated that the proposed ground rule #2 "was not intended to preclude discussion about any and all issues at any point in time." Thus, Troutbrook proposed the following modified ground rule #2: "The parties agree to focus primarily on non-economic subjects before turning to economic subjects, but it is understood that this general framework does not preclude either party from raising and freely discussing any item at any point in the bargaining process." G.C. Ex. 2(g) (p. 29).

On June 15, 2020, Martin wrote to Pascucci, responding to Pascucci's June 10, 2020 e-mail. Martin began by expressing the Union's disappointment that Troutbrook had not provided a response to the complete contract proposal, the IWA and Rider provided by the Union on May 18, 2020, despite Pascucci's statement at the conclusion of the June 4, 2020 session that the company would provide a counterproposal covering at least some of the issues the following week. G.C. Ex. 2(g) (p. 26-27). Martin therefore asked when the Union could expect to receive a counterproposal to its complete contract proposal, as well as dates for additional negotiating sessions. G.C. Ex. 2(g) (p. 27). Martin then proceeded to address the modified ground rules Pascucci had provided, stating that the Union would not agree to ground rule #2 as modified. Martin stated:

> We have proposed a complete contract, covering both economic and non-economic terms. We want to be able to bargain over all such terms without artificial timeline or constraint. We do not believe you can preclude the parties from bringing up certain subjects. The Union rejects this proposed ground rule. Let us know if you are refusing to have

> meaningful discussion on economics until all non-economic subjects are addressed.

G.C. Ex. 2(g) (p. 27). The Union confirmed its agreement that there would be no recording of negotiating sessions and that responses to information requests would be provided within a reasonable timeframe, but rejected the remainder of the ground rules as modified in Pascucci's June 10, 2020 e-mail. G.C. Ex. 2(g) (p. 27-28).

Pascucci responded in an e-mail on June 18, 2020, stating that "the Hotel is prepared to move forward without the[] additional proposed ground rules," and that Troutbrook intended to proceed with the negotiations in the following manner:

- In responding to the Union's proposals, the Hotel will focus on non-economic subjects first.

- With respect to any information requests, the Hotel will ask that those be made in writing in order to avoid any misunderstandings about what is being requested. Should the Union decline to put any requests in writing, we will take the time during bargaining to write down in our notes each request word-for-word and we will send a follow-up email asking you to confirm the accuracy of our notes.

- During bargaining the Hotel will engage in substantive discourse about the subjects being discussed, but none of our words should be viewed as a proposal or a counter proposal since my experience has been that this can lead to misunderstandings, especially when certain words are taken out of context. Instead, all of the Hotel's proposals and counter proposals will be presented in writing. If the Union decides to make a verbal proposal without presenting it in writing, we will proceed as noted above with respect to information requests.

- The Hotel still intends to enter into written tentative agreements as we move through the subjects of bargaining, and these tentative agreements will not become effective until there is an overall contract ratified by your membership. We will sign these tentative agreements and ask the Union to do the same. If the Union declines, we will send a follow-up email setting forth our understanding of the terms for agreement, and asking you to confirm the accuracy of our understanding.

G.C. Ex. 2(g) (p. 25-26).

The next negotiating session took place one week later, on June 25, 2020. Martin and Operations Assistant Julissa Sanchez attended for HTC, and Pascucci and Crespi attended for Troutbrook. G.C. Ex. 2(h), p. 1; R.S. Ex. 1, p. 2. The session

began with Crespi reporting on current occupancy rates, the Hotel's operations, and the recall of employees pursuant to an information request Martin had made. G.C. Ex. 2(h), p. 1-3. Pascucci then briefly reviewed non-economic proposals that he had just sent to Martin, including a Preamble, Recognition, No Discrimination, No Strikes or Lockouts, New Employees (probationary period), Hours of Work, and Effective Dates of the collective bargaining agreement. G.C. Ex. 2(h), p. 3-4; G.C. Ex. 2(i). Martin stated that the Union did not agree to address solely non-economic issues, and asked when the Union could expect to receive proposals on wages, health benefits, and retirement benefits. Pascucci responded, "Working on non-economics first, that's our plan." In addition, Pascucci stated that Troutbrook did not know "what the economics are going to be like," and could not present a proposal "until we're in a position to offer something." Pascucci stated that the Hotel was "operating according to status quo," expected to "remain at status quo for the foreseeable future," and had not yet discussed an economic proposal. Martin renewed the Union's request for a complete proposal, and explained that the bargaining unit employees had questions regarding wages, health benefits, and retirement that he needed to be able to address. Pascucci complained again regarding the length and "pattern contract" nature of the Union's proposal, and Martin explained that the Rider was specifically tailored to Troutbrook's facility, particularly in terms of vacation language and wage rates. Martin thus once again renewed the Union's request for a complete proposal. G.C. Ex. 2(h), p. 4-5.

The parties then proceeded to discuss the language in Troutbrook's proposal in further detail. Martin noted that although the Hotel's proposal was ostensibly based upon the Union's proposal pertaining to the six specific topics it encompassed, some language contained in the Union's proposal had been omitted. Martin asked whether this material was being rejected, and Pascucci responded that while the Hotel was not agreeing to the Union's proposals, its current proposals were only "a subset on these topics." Martin asked how many proposals the Hotel intended to make, and Pascucci stated that the Hotel intended to "work on these topics" until a tentative agreement was reached, and then continue to "the next set of proposals." Martin stated that he would discuss the topics contained in the Hotel's proposal, but asked again for additional proposals regarding wages and health and retirement benefits.

Martin then proceeded to address the six items comprising the Hotel's proposal. Martin suggested that the parties agree to the Union's broader non-discrimination language. He then asked about the Hotel's open shop proposal, and Pascucci clarified that the provision was not intended to allow management to pressure employees with respect to whether or not to join the Union. The parties then discussed the applicability of the Hotel's proposed six-month probationary period. During that discussion, Pascucci stated that all tentative agreements were subject to the ratification of a final agreement, and the Union could not rely upon oral representations. The parties then discussed the Hotel's Hours of Work proposal in comparison to the pertinent provision of the IWA. The session ended with Martin requesting that the Hotel provide a copy of the Hotel's existing probationary procedure which formed the basis for its proposal, and again urging the Hotel to consider providing a complete proposal encompassing all mandatory subjects of bargaining. G.C. Ex. 2(h), p. 5-10.

After the June 25, 2020 negotiating session, the parties did not meet again for bargaining until February 2, 2021. There is no dispute that this hiatus was engendered by the substantial impact of the COVID-19 pandemic on the New York City hospitality industry, including HTC's general membership and Respondent's business. Tr. 37-38. There is no contention that the hiatus was caused by or evinced bad faith on the part of Respondent, or that Respondent refused to meet with the Union during this period. Tr. 46-47.

The next negotiating session took place on February 2, 2021, with Martin and Sanchez attending for the Union and Pascucci and Director of Finance Aida Tejada attending for the Hotel. G.C. Ex. 2(j), p. 1; R.S. Ex. 1, p. 2. This session opened with a discussion between Martin, Pascucci, and Tejada regarding the status of the bargaining unit employees, including the current number of employees in each job classification, layoffs, and recall offers. Martin then stated that he had not received any additional response to the complete proposal the Union had made the previous year, and was still awaiting a proposal from the Hotel that encompassed economic issues. Pascucci stated that the Hotel intended to move through non-economic subjects in sets of six issues before addressing economic terms. G.C. Ex. 2(j), p. 2-3; R.S. Ex. 1, p. 2. In response, Martin reiterated his request for a complete proposal, stating that "piece meal" bargaining was unproductive and did not satisfy the legal standards for bargaining in good faith. Pascucci said he would discuss that position with his client. Martin suggested that even if Pascucci intended to negotiate a completely new contract he could begin with the Union's proposal, but Pascucci stated again that the Hotel was seeking easy, simple, concise language which provided a lot of flexibility. Martin stated that he was willing to bargain to establish the flexibility that would accommodate the Hotel's specific operational needs. Pascucci responded that the Union's proposal was "not reality," and that the IWA and Rider provisions were overly "restrictive and expensive." Martin stated that the provisions could be made less convoluted and the economics less expensive through negotiations, but "At some point you have to accept that your hotel is union and start negotiating." Pascucci stated that the Hotel had provided counterproposals on several articles, and Martin reiterated that it was not possible to engage in piecemeal bargaining, such as discussing the hours of work provisions without a wage proposal. Martin stated again that providing a complete proposal was a bargaining obligation and Pascucci responded, "Of course we will, it's a matter of when." G.C. Ex. 2(j), p. 3-4; R.S. Ex. 1, p. 2.

On February 5, 2021, Martin wrote to Pascucci requesting information regarding the current bargaining unit employees, including layoffs, recall offers, new hires, current employees, employees who had quit, overtime, and changes in work assignments. G.C. Ex. 2(k). In a subsequent series of e-mails, the parties scheduled the next session for March 11, 2021. In the last e-mail of this sequence, Martin asked that the Hotel "provide a complete proposal, including economics and addressing all mandatory topics." G.C. Ex. 2(l).

The next negotiating session took place on March 11, 2021, with Martin and Sanchez attending for the Union, and Pascucci and Tejada attending for the Hotel. G.C. Ex. 2(m), p. 1; R.S. Ex. 1, p. 2. The session began with a discussion of the overall state of the area hotel industry in light of current status of the COVID-19 pandemic. Tejada provided a forecast for 2021 of anticipated payroll based on projected occupancy, which the parties discussed in the context of Martin's February 5, 2021 information request. G.C. Ex. 2(m), p. 1-3; R.S. Ex. 1, p. 2.

Martin then addressed the overall status of negotiations, stating if the Hotel expressed a willingness to agree to the IWA with a Rider, he could "come up with as many deals and breaks" as possible to arrive at an overall agreement, as opposed to "continuing to slog this out." G.C. Ex. 2(m), p. 4; R.S. Ex. 1, p. 2. Pascucci reiterated that the Hotel wanted to negotiate its own contract reflecting the fact that it is a small hotel in Brooklyn, stating that the future was "questionable." Martin responded that the Union was waiting for a proposal, and Pascucci stated again that the Hotel intended to bargain regarding subsets of issues, moving onto a new group of topics after the previous group was resolved. Martin stated that the Hotel was legally obligated to provide a complete proposal, and that at that particular stage in the negotiations refusing to provide an economic proposal did not constitute good faith bargaining. Pascucci asked for Board cases supporting Martin's position, which Martin agreed to provide, and stated that the Union was refusing to respond to the Hotel's six proposals without receiving a complete proposal. Martin asked if the Hotel had another proposal or document, and Pascucci stated that none was forthcoming at the time. Tejada then stated that the Hotel was not making full payments on its loan and could not negotiate when they did not know what would happen with its lender. The session ended with Martin stating that he would provide dates for additional negotiations by e-mail. G.C. Ex. 2(m), p. 3-4; R.S. Ex. 1, p. 2-3.

On March 30, 2021, Martin wrote to Pascucci providing dates for additional bargaining, and discussing the course of the parties' negotiations. G.C. Ex. 2(n). In this letter, Martin stated that the Hotel's failure to provide a proposal encompassing all mandatory subjects of bargaining constituted a refusal to bargain in good faith, and again demanded that the Hotel provide "a complete contract proposal, addressing all mandatory topics." G.C. Ex. 2(n). Pascucci responded later that day, stating that his approach to negotiations, particularly for first contracts, generally entailed resolving non-economic subjects of bargaining prior to addressing economic topics. Pascucci also asserted that the Union was refusing to bargain regarding the six proposals the Hotel had provided during the negotiations until the Hotel provided a complete proposal. Pascucci further stated that Martin had not provided legal support for his contention that refusing to provide a complete proposal constituted a failure to bargain in good faith. G.C. Ex. 2(o) (p. 61-62). On April 5, 2021, Martin responded, discussing what he contended were inaccuracies in Pascucci's March 20, 2021 e-mail and stating that as the Hotel had never identified legal support for its refusal to provide a complete proposal, the Union was not obligated to legally substantiate its own position. G.C. Ex. 2(o) (p. 60).

The next and final negotiating session took place on April 21, 2021. Martin and Sanchez attended for the Union, and Pascucci and Tejada attended for the Hotel. G.C. Ex. 2(p), p. 1; R.S. Ex. 1, p. 3. Martin opened the session by asking whether now that spring had arrived the parties could reach agreement, and Tejada responded, "No." Martin then asked Pascucci about a complete proposal, and Pascucci stated, "Let's see what the Board says about conforming to your approach or not." Martin said that he did not see how he could respond without a complete proposal, and suggested that the parties discuss day-to-day business issues at the Hotel. Pascucci said that "what the future holds for this property" was still uncertain, because the Hotel might not be "sustainable" unless business conditions improved, although at that point it was "hanging on." G.C. Ex. 2(p), p. 1; R.S. Ex. 1, p. 3. The parties then discussed the current occupancy and staffing, with Martin proposing that recalls be made in seniority order, and Pascucci said that he could not commit to seniority-based recall. G.C. Ex. 2, p. 1-3; R.S. Ex. 1, p. 3. The parties reiterated their positions with respect to the mechanics of bargaining, with Pascucci questioning why the Union would not discuss individual topics without a complete proposal from the Hotel, and Martin contending that the Union needed a complete proposal including wages for meaningful bargaining to occur. Martin and Pascucci both stated that they would leave the issue at that point for the Board to decide, but would remain in contact regarding issues involving the Hotel's day-to-day operations and staffing. G.C. Ex. 2, p. 3; R.S. Ex. 1, p. 3.

## Decision and Analysis

The Complaint alleges that Troutbrook violated Sections 8(a)(1) and (5) of the Act by failing and refusing to bargain collectively in good faith with HTC by its overall conduct, including the following: (a) refusing to provide comprehensive counterproposals; (b) restricting the non-economic subjects over which it would bargain; and (c) refusing to bargain regarding economic subjects until all non-economic subjects of bargaining were resolved. In his Post-Hearing Brief, General Counsel argues that Troutbrook refused to bargain in good faith by refusing to make proposals or bargain regarding economic issues until all non-economic matters had been resolved, and by limiting the non-economic subjects it was willing to address in negotiations to six topics – recognition, non-discrimination, a no-strike/no-lockout provision, new employee probation, hours of work, and effective dates of a collective bargaining agreement.[4] Troutbrook argues that its conduct was within the bounds of permissible behavior with respect to good faith collective bargaining pursuant to Section 8(a)(5).

Section 8(a)(5) of the Act provides that an employer may not "refuse to bargain collectively with the representative of [its] employees." Section 8(d) of the Act defines collective bargaining as involving a "mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith

[4] While General Counsel asserted in his opening statement and states in his Post-Hearing Brief that the Hotel's failure to provide a complete counterproposal evinces a lack of good faith in bargaining, he provides no specific legal authority or argument based upon the record evidence in support of this contention. G.C. Post-Hearing Brief at p. 11-15; see also Tr. 7-8. As a result, I will not address this issue.

with respect to wages, hours, and other terms and conditions of employment." The Supreme Court has stated that good faith bargaining "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining agreement." *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 485-486 (1960); see also *NLRB v. Katz*, 369 U.S. 736, 747 (1962). The Act "does not compel any agreement whatsoever," nor does it require that the parties "contract on any specific terms." *NLRB v. American National Insurance Co.*, 343 U.S. 395, 401-402 (1952); *NLRB v. Insurance Agents Int'l Union*, 361 U.S. at 486. However, the parties "are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." *NLRB v. Insurance Agents Int'l Union*, 361 U.S. at 486. Thus, in describing the scope of a refusal to bargain in good faith, the Supreme Court has held that parties must refrain from conduct which "reflects a cast of mind against reaching agreement," and "is in effect a refusal to negotiate," as well as conduct which "directly obstructs or inhibits the actual process" of collective bargaining negotiations. *NLRB v. Katz*, 369 U.S. at 747.

For many years, the Board, with the approval of the federal appellate courts, has held that an employer's indefinite insistence on the resolution of all non-economic subjects of bargaining prior to addressing economic matters violates Sections 8(a)(1) and (5) of the Act, because such conduct inhibits the process of collective bargaining. See, e.g., *Wyman Gordon Pennsylvania, LLC*, 368 NLRB No. 150 at p. 3, and at p. 14, fn. 8 (2019), enf'd. 836 Fed.Appx. 1 (D.C. Cir. 2020) (Member McFerran dissenting in part) (collecting cases); *Detroit Newspapers*, 326 NLRB 700, 794 (1998), rev. on other grounds 216 F.3d 109 (D.C. Cir. 2000); see also *Crispus Attucks Children's Center*, 299 NLRB 815, 837 (1990); *Eastern Maine Medical Center*, 253 NLRB 224, 245 (1980), enf'd. 658 F.2d 1 (1st Cir. 1981); *Patent Trader*, 167 NLRB 842, 853 (1967), enf'd in relevant part 415 F.2d 190 (2d Cir. 1969), modified on other grounds 426 F.2d 791 (1970 (en banc)). This doctrine is based upon an understanding that the mechanics of productive collective bargaining require the "exchange of views on all mandatory bargaining subjects." *Patent Trader*, 167 NLRB at 853. The Board has repeatedly explained that the "give and take" of legitimate, good-faith bargaining necessarily encompasses the consideration of multiple proposals simultaneously, even proposals which may not be facially or conceptually related to one another. See, e.g., *Cal-Pacific Furniture Mfg. Co.*, 228 NLRB 1337, 1341 (1977), enf' denied on other grounds 580 F.2d 942 (9th Cir. 1978) (quoting *Korn Industries, Inc. v. NLRB*, 389 F.2d 117, 121 (4th Cir. 1967) ("Bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas"); *Rhodes-Holland Chevrolet Co.*, 146 NLRB 1304, 1316 (1964) (noting the frequent "interrelation, as a practical matter, between clauses which, on their face, deal with entirely different subjects" such that "agreement is often reached because one party gives something in one area and the other is therefore willing to modify or withdraw its demand with respect to an apparently unrelated subject").[5] Thus, the Board has found that in the pragmatic context of

[5] Pascucci acknowledged this dynamic in his discussions with the Union during negotiations, stating that in his experience "some difficult non-economic items…would be left open," and when parties discussed economic issues, "they would often make deals and trade things, and that's how you get to a contract ultimately." Tr. 54. Martin did as well, repeatedly stating that the Union needed a complete proposal to determine the impact of its different components on one another, to evaluate each component of the

collective bargaining negotiations, an employer's "insistence on refusing to discuss and submit counterproposals on economic matters until all non-economic items [are] resolved constitutes persuasive evidence of intent not to reach agreement." *Patent Trader*, 167 NLRB at 853. In *Patent Trader*, the Board stated that by "postponing…to the very end of negotiations…the most fundamental terms and conditions of employment (wages, hours of work, overtime, severance pay, reporting pay, holidays, vacations, sick leave, welfare and pensions, etc.), [the employer] reduced the flexibility of collective bargaining, narrowed the range of possible compromises, and 'cut off' the 'infinite opportunities for bargaining.'" 167 NLRB at 853, quoting *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 223, 225 (1949); see also *NLRB v. Patent Trader, Inc.*, 415 F.2d at 198; and see *South Shore Hospital*, 245 NLRB 848, 858 (1979), enf'd. 630 F.2d 40 (1st Cir. 1980).

The record evidence in the instant case establishes that Troutbrook fell short of its duty to bargain in good faith for precisely this reason, impeding the negotiating process in the manner discussed above. Immediately prior to the initial negotiating session on May 18, 2020, HTC provided the Hotel with a comprehensive proposal – encompassing all economic and non-economic terms – in the form of the IWA and a proposed Rider specifically modifying the IWA's terms to apply to Troutbrook. The Rider included economic subjects such as wages, health and pension benefits, vacation and other forms of paid leave, and the IWA contained additional economic provisions addressing subjects such as overtime, premium pay and shift differentials, holidays, severance pay, and a 401(k) plan. G.C. Exs. 2(d), 3.

Troutbrook rejected this proposal in its entirety at the second session on June 4, 2020. The Hotel then pursued an explicit strategy of addressing non-economic issues prior to fundamental economic matters such as wages and benefits. During that session, Pascucci proposed several "ground rules," including focusing on non-economic issues prior to addressing economic issues. Several hours after the session ended, Pascucci sent Martin the Hotel's proposed ground rules in writing, including, "The parties will focus on non-economic subjects before turning to economic subjects." When Martin unequivocally rejected that rule, Pascucci modified it to propose that "The parties agree to focus primarily on non-economic subjects before turning to economic subjects, but it is understood that this general framework does not preclude either party from raising and freely discussing any item at any point in the bargaining process." When Martin rejected this formulation of the rule as well, Pascucci announced Troutbrook's intention to proceed with negotiations as follows: "In responding to the Union's proposals, the Hotel will focus on non-economic subjects first."

Troutbrook proceeded in this manner throughout the remainder of the negotiations, ultimately demonstrating an insistence on resolving non-economic subjects of bargaining before economic issues would be addressed. After Troutbrook rejected the IWA and Rider at during the second negotiating session on Jun 4, 2020, the Union immediately requested a complete counterproposal, reiterating this request in

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contract in an overall context, and to work with the bargaining unit employees to reach an overall agreement. G.C. Ex. 2(j), p. 3-4; G.C. Ex. 2(p), p. 3.

Martin's June 5 and June 15, 2020 e-mails. However, at the next session, on June 25, 2020, Troutbrook presented a proposal covering only six non-economic subjects of bargaining – Preamble, Recognition, No Distrimination, No Strikes or Lockouts, New Employees (probationary period), Hour of Work, and Effective Dates of a contract. HTC requested again that the Hotel provide proposals regarding wages and benefits, but the Hotel declined to do so. Thus, the first month of bargaining involved the Union's providing a comprehensive proposal covering all subjects of bargaining, and the Hotel's providing a counterproposal consisting of only six non-economic subjects. In the face of the Union's repeated requests for a comprehensive proposal including economics, the Hotel took the position that "Working on non-economics first, that's our plan."

Nor did the Hotel provide any proposal including economic subjects during the three months of bargaining beginning on February 2, 2021. All of these sessions – which took place on February 2, 2021, March 11, 2021, and April 21, 2021 – were characterized by HTC's request for a complete proposal including economic issues, and the Hotel's refusal to discuss anything other than the six non-economic proposals it had presented the previous year. Nor did Troutbrook provide any economic proposals in response to Martin's written requests for a complete proposal including economic subjects of bargaining on March 8 and March 30, 2021, and on April 5, 2021. Thus, for the entire process of bargaining – four months of actual negotiations and a six-month hiatus necessitated by the circumstances engendered by the COVID-19 pandemic – Troutbrook refused to provide any proposal whatsoever involving "the most fundamental terms and conditions of employment." *Patent Trader*, 167 NLRB at 853. Moreover, Pascucci's statements in response to the Union's demand for a complete proposal – such as "Working on non-economics first, that's our plan" (June 25, 2020) and "Ratification process is when all comes together" (April 21, 2021) – conveyed that the Hotel did not intend to engage with the Union regarding economic issues until "the very end of negotiations." *Patent Trader*, 157 NLRB at 853; see G.C. Ex. 2(p), p. 3 (). Troutbrook's refusal to provide any proposal involving economic terms in such circumstances evinced an intent to frustrate agreement, and constitutes a violation of Section 8(a)(5) under the pertinent caselaw.[6] See *Sunbelt Rentals, Inc.*, 370 NLRB No. 102 at p. 3 (2021) (refusal to provide a wage counterproposal for four months violated Section 8(a)(5)); *Kalthia Group Hotels*, 366 NLRB No. 118 at p. 18 (2018) (three and one-half month delay in providing counterproposals regarding wages and healthcare indicative of bad-faith bargaining); *Adrian Daily Telegram*, 214 NLRB 1103, 1111-1112 (1974) (refusal to make an economic counterproposal for at least four months following union and mediator's requests violated Section 8(a)(5)).

Troutbrook further contends that its insistence on addressing non-economic issues prior to negotiating regarding economic terms and conditions of employment was justified given that the negotiations involved an initial collective bargaining agreement

[6] Troutbrook argues that it did not insist on the negotiation of non-economic issues before addressing economic subjects in a manner which evinced an intent to frustrate agreement because it did not use the word "all" when referring to the quantum of non-economic subjects it wished to resolve before it would begin to address economic matters. R.S. Post-Hearing Brief at 17; Tr. 50. Given the course of negotiations and the caselaw discussed herein, that argument is not persuasive.

between the parties. Pascucci testified based upon his experience that in collective bargaining involving a first contract, language is often negotiated first, with economic terms introduced into the discussions after the majority of the non-economic matters have been resolved. Tr. 68-70. Martin testified that he was also aware of such an approach in first contract situations. Tr. 50-51. However, Troutbrook does not provide any legal authority in support of the proposition that a first contract situation somehow exempts an employer from the general rule that insisting upon negotiating non-economic issues prior to addressing economic terms undermines productive bargaining such that it constitutes a violation of Section 8(a)(5). To the contrary, this principle was specifically developed and has been consistently applied in the context of negotiations between an employer and a newly-certified union for an initial collective bargaining agreement. See *Rhodes-Holland Chevrolet Co.*, 146 NLRB at 1305, 1306-1307, 1316-1317 (noting that "By insisting that nonmoney matters be settled before cost items were even discussed, the Company put the Union in the position of being unable to make significant concession in these areas as a *quid pro quo*…for a wage increase"); *Patent Trader*, 167 NLRB at 842; *Adrian Daily Telegram*, 214 NLRB at 1110-1112; *Crispus Attucks Children's Center*, 299 NLRB at 817; *Sunbelt Rentals, Inc.*, 370 NLRB No. 102 at p. 1. Indeed, it is consistent with the policy underlying presumptive majority status during the "certification year" – to provide a newly certified union with "ample time for carrying out the mandate of its members" without "exigent pressures to produce hothouse results or be turned out." *Chelsea Industries*, 331 NLRB 1648, 1649 (2000), enf'd. 285 F.3d 1073 (D.C. Cir. 2002), quoting *Brooks v. NLRB*, 348 U.S. 96, 100 (1954). As the Supreme Court stated in *Brooks v. NLRB*, "It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties." 348 U.S. at 100; see also *Kalthia Group Hotels*, 366 NLRB No. 118 at p. 18, quoting *J.P. Stevens & Co. Inc.*, 239 NLRB 738, 765 (1978), enf'd in relevant part 623 F.2d 322 (4th Cir. 1980) ("It is manifestly detrimental to the Union's preservation of employee support to delay the submission of proposals").

Furthermore, the evidence does not establish any mutual agreement between the Hotel and the Union to address non-economic issues before turning to economic matters. HTC immediately objected to the Hotel's proposed ground rule providing that the parties focus on non-economic issues prior to addressing economic provisions, rejected the Hotel's proposed modification of this ground rule, and repeatedly reiterated its demand for a proposal addressing economic issues both at negotiating sessions and in correspondence. In response, the Hotel asserted that "In responding to the Union's proposals, the Hotel will focus on non-economic subjects first," and at negotiations Pascucci stated, "Working on non-economics first, that's our plan…I get that it's not your preference." Because the Union never agreed to address non-economic proposals prior to negotiating regarding economic issues, *Wyman Gordon Pennsylvania, LLC*, cited by Troutbrook, is inapposite here. 368 NLRB No. 150 at p. 2, 3, 5 (employer did not violate Section 8(a)(5) by "insisting indefinitely…on continuing to negotiate non-economic subjects before discussing economic subjects" given parties' "explicit agreement" in ground rules to "discuss non-economic proposals before economic proposals"); see *Sunbelt Rentals, Inc.*, 370 NLRB No. 102 at p. 3 (distinguishing

*Wyman Gordon Pennsylvania, LLC* on this basis).[7] In addition, the evidence does not establish, as it did in *Wyman Gordon Pennsylvania, LLC*, that the parties made progress regarding non-economic issues while a discussion of economic terms and conditions of employment was held in abeyance, by mutual agreement or otherwise. 368 NLRB No. 150 at p. 4-5 (parties continued to discuss and exchange proposals, "still making progress toward agreement" regarding outstanding non-economic issues when employer rebuffed the union's demand to discuss economic provisions).

For all of the foregoing reasons, the evidence establishes that Troutbrook indefinitely insisted on the resolution of all non-economic subjects of bargaining prior to addressing economic matters, thereby inhibiting the process of collective bargaining, and evincing an intent to frustrate agreement.

The record also establishes that Troutbrook refused to bargain in good faith by limiting the non-economic topics it was willing to discuss with HTC during the negotiations to six issues which it unilaterally chose. The Board has repeatedly found that a party's restrictions on subjects which it is willing to address in negotiations undermines the inherent "give and take" of the collective bargaining process in a manner which frustrates an overall agreement. See, e.g., *T-Mobile USA, Inc.*, 365 NLRB No. 23 at p. 2 (2017) (employer which "unilaterally removes certain bargaining subjects from negotiation…destabilizes the bargaining process"); *E.I. Dupont*, 304 NLRB 792, fn. 1 (1991) ("It is well settled that the statutory purpose of requiring good-faith bargaining would be frustrated if parties were permitted, or indeed required, to engage in piecemeal bargaining"); see also *Cal-Pacific Furniture Mfg. Co.*, 228 NLRB at 1341; *Rhodes-Holland Chevrolet Co.*, 146 NLRB at 1316.

Here, in addition to indefinitely postponing bargaining regarding economic subjects, Troutbrook restricted negotiations regarding non-economic issues to six topics that it unilaterally chose – Preamble, Recognition, No Distrimination, No Strikes or Lockouts, New Employees (probationary period), Hour of Work, and Effective Dates of a contract – during the entire four-month period of negotiations. The Hotel's proposal comprised of these six issues was initially presented at the June 25, 2020 meeting, with Pascucci stating that Troutbrook's intention was to "work on these topics," and only "move on to the next set of proposals" once a tentative agreement was reached. G.C. Ex. 2(h), p. 5. While the Union responded by requesting a complete proposal including "the holy trinity of economics," HTC also reviewed and discussed Troutbrook's six proposals in detail during that session. G.C. Ex. 2(h), p. 3-4, 5-9. At the next session on February 2, 2021, when the Union again requested a complete proposal including economics, Pascucci responded that Troutbrook intended to "first work through non economics, get through a half dozen and resolve and then move on to next sets." G.C.

[7] Troutbrook also argues that *Wyman Gordon Pennsylvania, LLC* requires dismissal of the Complaint in the instant case, and that *Sunbelt Rentals, Inc.* is inapposite, because there are no allegations here that Troutbrook committed other unfair labor practices. *Sunbelt Rentals, Inc.*, 370 NLRB No. 102, at p. 25. While evidence of other independent unfair labor practices may be relevant to a determination that an employer refused to bargain in good faith in violation of Section 8(a)(5), such a finding may be based upon the parties' course of conduct pertaining to negotiations alone.

Ex. 2(j), p. 2. Martin responded by emphasizing the Union's flexibility with respect to both language and economics, specifically stating that "When it comes to flexibility, we can bargain flexibility. We should change the IWA for your operational needs." Martin further offered to "bargain over [language] and talk about it so you don't think it's more convoluted than it is or we can bargain over things to make them less expensive." Pascucci responded that "Of course" Troutbrook would provide a complete proposal, "it's a matter of when." G.C. Ex. 2(j), p. 3-4. However, Troutbrook never subsequently provided any additional non-economic proposals, ostensibly because the six proposals it had presented the previous year had not been resolved. The Board has determined that such "piecemeal" negotiations undermine the bargaining process and evince an intent to frustrate ultimate agreement. See *Whitehall Corp.*, 357 NLRB 1119, 1179 (2011) ("Insistence on this type of 'piecemeal' bargaining, in which a party demands that certain issues be resolved before any others may be considered, is indicative of bad-faith bargaining"); see also *Pillowtex Corp.* 241 NLRB 40, 47, 49 (1979), enf'd. 615 F.2d 917 (5th Cir. 1980) (insistence on resolution of non-economic issues before addressing economic subjects "fragmented" the bargaining process).

Finally, Troutbrook contends that the Union engaged in bad-faith bargaining, specifically that the Union made a "pretextual and unlawful demand" for a complete proposal, which "frustrated and derailed the bargaining process." R.S. Post-Hearing Brief at 18. However, the record establishes that the Union repeatedly expressed a willingness to work with the Hotel regarding both economic subjects and the language of a collective bargaining agreement. Martin's comments at the February 2, 2021 session, described above, indicated that the Union was willing to modify the IWA it had proposed to accommodate the Hotel's concerns, both in terms of contract language and wages, benefits and other economic terms. At the following session, on March 11, 2021, Martin made a similar overture, stating that "If at any time you want to put on your deal-making hat, I can come up with as many deals and breaks to come up with a deal. I want to make it work…" G.C. Ex. 2(m), p. 4. Thus, the Union repeatedly indicated while requesting a complete proposal that it was willing to negotiate not only economic subjects but also language in order to attempt to accommodate the Hotel's concerns. As a result, the record does not establish that the Union's desire to address the core economics inherent in the employment relationship simultaneously with non-economic issues detrimentally affected negotiations. Furthermore, the Complaint contains no allegations that HTC violated the Act, and there is no evidence in the record that Troutbrook filed an unfair labor practice charge alleging that the Union's conduct was somehow unlawful. Finally, it is well-settled that there is no equitable defense of unclean hands cognizable under the Act, as Board proceedings are instituted in the public interest to effectuate statutory policy, as opposed to vindicating private rights. See, e.g., *Décor Group, Inc.*, 356 NLRB 1391, 1395 (2011); *California Gas Transport, Inc.*, 347 NLRB 1314, 1326, fn. 36 (2006), enf'd. 507 F.3d 847 (5th Cir. 2007).

For all of the foregoing reasons, the evidence establishes that in the course of its negotiations with HTC, Troutbrook indefinitely insisted on the resolution of non-economic subjects of bargaining before addressing economic subjects, and restricted bargaining to six non-economic subjects which it unilaterally chose. Because such

conduct evinces an intent to frustrate agreement, the evidence establishes that Troutbrook failed and refused to negotiate in good faith with HTC, in violation of Sections 8(a)(1) and (5) of the Act.

## Conclusions of Law

1. Respondent Troutbrook Company, LLC d/b/a Brooklyn 181 Hospitality, LLC is an employer engaged in commerce at its 181 3rd Avenue, Brooklyn, New York facility within the meaning of Section 2(2), (6), and (7) of the Act.

2. New York Hotel and Motel Trades Council, AFL-CIO ("HTC") is a labor organization within the meaning of Section 2(5) of the Act.

3. Since September 24, 2018, HTC has been the certified collective bargaining representative of Respondent's full-time and regular part-time front-desk employees, housemen/bellmen, housekeepers, laundry attendants and food and beverage employees employed by the Employer at 181 3rd Avenue, Brooklyn, New York, excluding executive management, sales personnel, fire safety directors, all other employees including guards and supervisors, as defined by the National Labor Relations Act.

4. Respondent failed and refused to bargain in good faith with HTC by indefinitely insisting on the negotiation of non-economic issues prior to addressing mandatory economic subjects of bargaining, and by restricting bargaining to six non-economic proposals it unilaterally selected, thereby undermining the collective bargaining process and frustrating progress toward an overall agreement, in violation of Sections 8(a)(1) and (5) of the Act.

5. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

## The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist and take certain affirmative action designed to effectuate the Act's policies. Specifically, having found that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain in good faith, I shall order Respondent to meet with the Union upon request and bargain in good faith concerning the terms and conditions of employment of the bargaining unit employees and, if an agreement is reached, embody such agreement in a signed contract.[8] I shall further order Respondent to post and disseminate an appropriate notice.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:

[8] General Counsel does not request any extension of the certification year pursuant to *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

## Order[9]

Troutbrook Company, LLC d/b/a Brooklyn 181 Hospitality, LLC, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the New York Hotel and Motel Trades Council, AFL-CIO, as the exclusive collective bargaining representative of the employees in the bargaining unit, by refusing to bargain indefinitely regarding economic subjects until non-economic issues are resolved and by restricting bargaining to six non-economic proposals that it has unilaterally selected.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time front-desk employees, housemen/ bellmen, housekeepers, laundry attendants and food and beverage employees employed by the Employer at 181 3rd Avenue, Brooklyn, New York, excluding executive management, sales personnel, fire safety directors, all other employees including guards and supervisors, as defined by the National Labor Relations Act.

(b) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. If Respondent has gone out of business or closed the Brooklyn, New York

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

facility, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since April 22, 2020.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. December 1, 2021

Lauren Esposito
Administrative Law Judge

## APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with the New York Hotel and Motel Trades Council, AFL-CIO, by indefinitely refusing to bargain about economic subjects until non-economic issues are resolved and by restricting bargaining to six non-economic proposals that we unilaterally select.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL, at the Union's request, bargain with the Union in good faith as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time front-desk employees, housemen/ bellmen, housekeepers, laundry attendants and food and beverage employees employed by the Employer at 181 3rd Avenue, Brooklyn, New York, excluding executive management, sales personnel, fire safety directors, all other employees including guards and supervisors, as defined by the National Labor Relations Act.

TROUTBROOK COMPANY, LLC D/B/A
BROOKLYN 181 HOSPITALITY, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Two Metro Tech Center, 100 Myrtle Avenue, Suite 5100, Brooklyn, NY 11201-3838

(718)330-7713, Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/29-CA-275229 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (718)765-6190